No. 91-2019

In the
Supreme Court of the United States
October Term, 1991

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HUBERT H. HUMPHREY, III
Minnesota Attorney General
102 State Capitol
Saint Paul, Minnesota 55155
MICHAEL O. FREEMAN
Hennepin County Attorney
BEVERLY J. WOLFE
Assistant Hennepin County Attorney
Attorney of Record
Hennepin County Attorney's Office
C-2000 Government Center
Minneapolis, Minnesota 55487
Phone: (612) 348-8794

Attorneys for Petitioner

1992 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

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REASONS FOR GRANTING THE WRIT

I. THE POSSIBILITY THAT COLLATERAL LEGAL CONSEQUENCES WILL BE IMPOSED UPON RESPONDENT AS A RESULT OF THE TRIAL COURT'S FINDING OF GUILT SHOWS THAT THIS CASE PRESENTS A LIVE CONTROVERSY AND IS NOT MOOT.

Under Article III, § 2 of the United States Constitution, this Court may only adjudicate ongoing cases or controversies. There is a continuing controversy in this case and the recent dismissal of the complaint against Respondent under the provisions set forth in Minn. Stat. § 152.18, subd. 1 (1989) does not render it moot.

"[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 51 (1968). This Court has repeatedly "adjudicated the merits of criminal cases in which the defendant has been" discharged from either a probationary or prison sentence. *Id.* In several cases, this Court has held that a case is not moot if the underlying criminal proceedings may subject the defendant to enhanced sentences in future criminal proceedings. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985); *Benton v. Maryland*, 395 U.S. 784, 787-91 (1969) (although possibility that the conviction may some day enhance the petitioner's sentence in a future criminal prosecution "may well be a remote one, it is enough to give this case an adversary cast and make it justiciable"); *Street v. New York*, 394 U.S. 576, 579 n.3 (1969).

In rejecting a defendant's claim that the State of Pennsylvania's petition from an adverse state court ruling was moot because the defendant had already completed his sentence, this Court noted:

> [This Court's] more recent cases have held that the possibility of a criminal defendant's suffering "collateral legal consequences" from a sentence already served permits him to have his claims reviewed here on the merits. If the prospect of the State's visiting such collateral consequences on a criminal defendant who has served his sentence is a sufficient burden as to enable him to seek reversal of a decision affirming his conviction, the prospect of the State's inability to impose such a burden following a reversal of the conviction of a criminal defendant in its own courts must likewise be sufficient to enable the State to obtain review of its claims on the merits here. In any future state criminal proceedings against respondent, this conviction may be relevant to setting bail and length of sentence, and to the availability of probation.

Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977).

Here, collateral consequences may still be imposed upon Respondent despite the dismissal of the complaint pursuant to Minn. Stat. § 152.18, subd. 1. The trial court found Respondent guilty of the charged offense (T. 65-66).[1] Under the diversionary disposition provisions of

1. "T" refers to the transcript of the pretrial, trial and sentencing proceedings in this case.

Minn. Stat. §152.18, subd. 1, the trial court deferred entry of the adjudication of guilt and placed Respondent on probation for a period of two years.[2] Pursuant to the provisions of Minn. Stat. § 152.18, subd. 1, the trial court filed an order[3] discharging Respondent from probation and dismissing the underlying complaint.

Respondent's mootness claim is based upon his erroneous belief that his discharge from probation without an entry of an adjudication of guilt means he will not suffer any adverse collateral consequence as a result of the criminal proceedings in this case. But statutory and case law show that, if the Minnesota Supreme Court's decision is

2. Both the transcript and the probation order show that a probationary sentence was imposed upon Respondent (T.69-70). *See* Probation Order (reprinted in Appendix A). This probationary sentence required Respondent to adhere to certain conditions. Therefore, Respondent's claim that he was not "subjected to any penal consequence" is erroneous. *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari, p.13. On October 3, 1990, it was reported that Respondent had violated a condition of his probation and the stay of imposition was revoked. *See* Report of the Department of Court Services and Order of the Court for Defendant's Arrest, Detention and Summary Hearing (reprinted in Appendix B). On November 5, 1990, this revocation was vacated and Respondent was again placed on probation.

3. This order, which was signed on April 28, 1992 and filed on May 6, 1992, is reprinted in Appendix A of Respondent's Brief in Opposition to Petition for a Writ of Certiorari. This is a routine order for cases governed by Minn. Stat. § 152.18 (1989). It should be noted that although the order states the Hennepin County Attorney recommended that the court dismiss the complaint, the Hennepin County Attorney's Office was not notified about this order until after it was filed. Since Respondent successfully completed probation and was entitled to this discharge and dismissal, the Hennepin County Attorney's Office did not file a motion requesting vacation of this order.

reversed by this Court, Respondent will be subject to adverse collateral consequences.

Defendants who have been discharged under Minn. Stat. § 152.18 are not accorded the same status as defendants who have had charges dismissed, been acquitted at trial, or had their convictions reversed on appeal. Because Minn. Stat. § 152.18 requires that a finding or admission of guilt occur before this diversionary disposition can be utilized, defendants discharged under this statute are not entitled to the broader expungement relief available under Minn. Stat. § 299C.11.[4] Relief under Minn. Stat. § 299C.11 is not applicable to criminal proceedings where there has been a finding or admission of guilt even though no formal adjudication of guilt was entered.[5] *See City of St. Paul v. Froysland*, 246 N.W.2d 435, 436, 439 (Minn. 1976) (the policy underlying Minn. Stat. § 299C.11 is to protect those who have had a "'determination of all pending criminal actions or proceedings in favor of the arrested person,'" not those who have pled guilty and served a probationary sentence). Respondent will only be entitled to expungement relief under Minn. Stat. § 299C.11 if the Minnesota Supreme Court's decision is allowed to stand.

Additionally, Minn. Stat. §152.18, subd. 1,[6] provides that when a defendant is discharged under this statute:

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4. This statute and Minn. Stat. 152.18, subd. 2 (1989), are reprinted in Appendix B of Respondent's Brief In Opposition to Petition for a Writ of Certiorari.

5. Respondent erroneously claims that he is entitled to expungement under Minn. Stat. § 299C.11. *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari, pp. 5, 14.

6. This statute is reprinted in Appendix D of the Petition for a Writ of Certiorari.

> Discharge and dismissal hereunder shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against such persons.

In *State v. Goodrich*, 256 N.W.2d 506 (1977),[7] the Minnesota Supreme Court relied upon the above-quoted statutory language when it rejected a mootness argument that is identical to Respondent's argument. In holding that the dismissal of the proceedings pursuant to Minn. Stat. § 152.18 did not render the defendant's appeal moot, the supreme court stated:

> The statute contemplates use of the record should defendant have "future difficulties with the law." We accordingly find a sufficient "possibility" of "adverse collateral legal consequences" to hold that this appeal is not moot.

Goodrich, 256 N.W.2d at 512. *See generally Hewett v. North Carolina*, 415 F.2d 1316, 1322 (4th Cir. 1969) (discharge from sentence did not make case moot since "[a]ny judge who might be called upon to consider probation or sentence for future offenses for either of

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7. Respondent cited this case when he argued below that the absence of an adjudication of guilt did not bar appeal of his case. *See* Brief for Appellant, *State v. Dickerson*, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992), p.1.

petitioners would be bound to be influenced by that petitioner's prior probationary experience").

More significantly, as demonstrated by the Eighth Circuit Court of Appeals decision in *United States v. Frank*, 932 F.2d 700 (8th Cir. 1991), *the deferred adjudication in this case will be included in Respondent's criminal history score if he is convicted of a federal offense.* Like Respondent, the defendant in *Frank* was given a stay of adjudication and placed on probation under Minn. Stat. § 152.18. When he was subsequently convicted of a federal offense, the defendant's prior disposition under §152.18 was included in the calculation of his criminal history score. The Eighth Circuit held that inclusion of this prior diversionary disposition in the defendant's criminal history score was proper under U.S.S.G. §§ 4A1.1(c) and 4A1.2(f)[8] since diversionary dispositions can only be imposed under Minn. Stat. § 152.18 after a finding or admission of guilt has been made. *See Frank*, 932 F.2d at 701; *see also United States. v. Giraldo-Lara*, 919 F.2d 19, 22-23 (5th Cir. 1990) (held that a deferred adjudication probation in a Texas state court was properly included in the calculation of the defendant's criminal history score under the United States Sentencing Guidelines).

Significant collateral consequences are imposed upon a defendant following the successful completion of a diversionary disposition under Minn. Stat. § 152.18. This disposition will be relevant to both the availability of probation and the length of sentences in future criminal proceedings involving Respondent. But unless the Minnesota Supreme Court's decision is reversed,

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8. These United States Sentencing Guidelines provisions and their supporting commentary are reprinted in Appendix D.

Respondent will not be subject to any of these collateral consequences. The State of Minnesota's inability to impose these collateral consequences upon Respondent "is sufficient to enable the State to obtain review of its claims on the merits here." *Mimms*, 434 U.S. at 108 n.3. Therefore, this case is not moot and the State of Minnesota respectfully requests that review be granted.

II. THIS CASE SHOULD NOT BE DEEMED MOOT SINCE THE "PLAIN FEEL" ISSUE IS LIKELY BOTH TO RECUR AND EVADE REVIEW.

This Court has considered technically moot cases on their merits when the issues presented were "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). The "plain feel" issue raised in this case is one that is most likely to arise in cases involving the seizure of small amounts of controlled substances. In Minnesota, first-time defendants charged with possession of small amounts of controlled substances generally receive a diversionary disposition under Minn. Stat. § 152.18. Consequently, it is likely that in most Minnesota criminal cases where the "plain feel" issue will arise, the underlying complaint will be dismissed pursuant to Minn. Stat. § 152.18 before the case can come before this Court on review.

Assuming *arguendo* that this instant case is technically moot, it is requested that this court accept review because this issue is of critical importance to future law enforcement activities and will undoubtedly reoccur. Otherwise, the State of Minnesota will be seriously penalized by an adverse ruling on a Fourth Amendment issue that it, through no fault of its own, has been barred

from obtaining review by this court. *But see Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) ("'capable of repetition, yet evading review'" doctrine applicable only when "there was a reasonable expectation that the same complaining party would be subjected to the same action again").

III. IF THIS CASE IS ENTIRELY MOOT, THIS COURT SHOULD VACATE THE JUDGMENTS BELOW.

Assuming *arguendo* that this case is moot, then the State of Minnesota respectfully requests that this Court vacate the judgments below by the Minnesota Supreme Court and the Minnesota Court of Appeals. In *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), this Court stated:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss . . . . That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. *When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminar* [Footnote omitted; emphasis added.]

At least two federal circuit courts of appeals, the Fifth and Eleventh Circuits, have explicitly vacated the judgment below when a federal criminal case has been deemed moot on appeal. *See In Re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1987); *United States v. Sarmiento-Rozo*, 592 F.2d 1318, 1321 (5th Cir. 1979).

This Court has also vacated judgments from state supreme courts in civil cases and remanded "for such proceedings as by that court may be deemed appropriate." *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974).

The *Munsingwear* doctrine should be applied to state criminal cases such as the instant case. Unless the judgments below are vacated, the State of Minnesota will be unfairly prejudiced in future cases by the precedential effect that these judgments will undoubtedly have. *See generally Sarmiento-Rozo*, 592 F.2d at 1321.

CONCLUSION

There is a live controversy in this case and Respondent's mootness argument should be rejected. If this Court finds that this case is moot, it is respectfully requested that this Court vacate the judgments below.

For the reasons discussed herein and in the Petition for a Writ of Certiorari, the State of Minnesota respectfully requests that this Court grant the Petition for a Writ of Certiorari to review the judgment of the Minnesota Supreme Court.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Minnesota Attorney General
102 State Capitol
St. Paul, MN 55155
MICHAEL O. FREEMAN
Hennepin County Attorney
BEVERLY J. WOLFE
Assistant Hennepin County Attorney
Attorney of Record

ROBERT M. LEWIS
Law Clerk
C-2000 Government Center
Minneapolis, MN 55487
Phone: (612) 348-8794

Attorneys for Petitioner

July 28, 1992

APPENDIX

APPENDIX A

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Court No. 89067687

State of Minnesota,

Plaintiff,

PROBATION ORDER

vs.

Timothy Eugene Dickerson,

Defendant.

On May 9, 1990, *the above-named defendant entered a plea of guilty to the crime of* CONTROLLED SUBSTANCE CRIME FIFTH DEGREE - POSSESSION *and thereafter on* May 9, 1990, *defendant was placed on probation, without an adjudication of guilty under provisions of Minnesota Statute 152.18.*

And the Court being of the opinion that by reason of the character of defendant and the circumstances of this case it will be for the best interest of defendant and the best interest of justice that defendant be placed on probation for

the period and upon the conditions in this Order hereinafter specified.

NOW THEREFORE, IT IS ORDERED that in accordance with M.S. 152.18 defendant is placed on probation until May 8, 1992, *and assigned to the Hennepin County Department of Court Services for supervision.*

Said probation is granted, however, upon the express condition defendant shall observe the following order, rules and regulations:

Be truthful to your Probation Officer in all matters.
Keep your Probation Officer informed at all times of your place of residence and employment, and make no change in these without the knowledge and consent of your Probation Officer.
Do not leave the State of Minnesota without the consent of your Probation Officer.
Report to your Probation Officer as directed.
Do not incur any financial indebtedness without the knowledge and consent of your Probation Officer.
Obey all local ordinances and state and national laws.
Comply strictly with any additional requirements that may be imposed by the Court or your Probation Officer during the term of your probation.
It is unlawful for any person convicted of a felony to possess, use or receive any firearms, Title 7, Public Law 90-618, Gun Control Act of 1968.
Participate in a Chemical Health Assessment at I.B.C.A. and follow through with all recommendations.

Enter into and successfully complete any treatment program referred to and any and all aftercare as directed by Court Services if so recommended.
Submit to random urinalysis, as directed by Court Services.
No use of any mood-altering substances.
Participate in assessment at I.B.C.A. for assistance in educational/vocational planning and follow through with all recommendations.

Should defendant violate any of the conditions herein specified, sentence may be imposed.

P.O.: Doreen N. Robinson *DATED:* May, 1990

Telephone: 348-8080

ROBERT H. LYNN
Judge of the District Court

APPENDIX B

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Court No. 89067687

STATE OF MINNESOTA
Plaintiff,

- vs -

TIMOTHY EUGENE DICKERSON,
Defendant

REPORT OF THE DEPARTMENT OF COURT SERVICES AND ORDER FOR DEFENDANT'S ARREST, DETENTION AND SUMMARY HEARING

REPORT TO THE COURT: NOTICE TO DEFENDANT:

Whereas, defendant, TIMOTHY EUGENE DICKERSON, *who was heretofore on* May 9, 1990, *duly sentenced for the crime of* CONTROLLED SUBSTANCE CRIME 5TH DEGREE POSSESSION *and placed on probation to the Department of Court Services for a period of* two years *pursuant to the Order of the Honorable* ROBERT H. LYNN, *Judge of District Court, whereby* imposition under 152.18 *of sentence was stayed and defendant being now on probation to the Department of Court Services, and* _____

It has been made to appear to the satisfaction of the Department of Court Services that defendant has violated the terms of this probation in the following particulars:

The defendant tested positive for cocaine on 9-26-90.

THEREFORE, pursuant to Minnesota Statutes, Chapter 609, Section 609.14, the alleged violations are herein reported to the Court for such action as is deemed just and proper.

DATED: October 3, 1990

Approved by _____
CAROL A. SKRADSKI, *Corrections Unit Supervisor*

_____
DOREEN N. ROBINSON (348-8080) Probation Officer

ORDER OF THE COURT

It appearing from the foregoing there is a factual basis to believe that defendant has violated the terms and conditions of probation,

IT IS HEREBY ORDERED that the sheriff forthwith apprehend and take into custody said defendant and bring him before this Court to abide the further Order of this Court, and that a copy of the foregoing Report and of this Order be served on defendant upon execution of this Order.

IT IS FURTHER ORDERED that the stay of imposition under 152.18 *of sentence granted in the above-entitled matter be and the same is hereby revoked, and the*

probation time will be tolled until further order of this Court.

DATED: October 5, 1990
WARRANT TO BE EXECUTED OUT OF STATE:

NO____ YES____

ROBERT H. LYNN
Judge of District Court

APPENDIX C

Constitutional Provisions

Article III, §2, of the United States Constitution:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties, made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between citizens of different States,--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall be appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the

Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX D

United States Sentencing Guidelines Provisions

U.S.S.G. §4A1.1:

Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Page A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a

sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

U.S.S.G. §4A1.a(c), Commentary 3:

§4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this item. The term "prior sentence" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. See §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. See §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h),(i),(j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court martial. See §4A1.2(g).

U.S.S.G. §4A1.2(f):

Diversionary Dispositions

Diversion from the judicial process without a finding of guilty (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

U.S.S.G. §4A1.2(f), Commentary 9:

> *<u>Diversionary Dispositions</u>: Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.*